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## AMERICAN BUSINESS CORPORATIONS BEFORE 1786

THE title of this article requires a definition of the terms employed. The subject must necessarily be examined from a statistical standpoint, and statistics are of little value unless the basis upon which they are made up is stated with some precision. The phrase "business corporation" will be employed to denote only corporations formed primarily to promote business enterprises, either by the investment of money as a productive capital, or by encouraging and facilitating such investments on the part of others. The term "American" is used in accordance with its conventional acceptance in this country, as restricted to what pertains to territory included within the limits of the United States.

The year 1789 has, of course, been selected as the close of the period to be considered because from that time on the country came under the influence of new social and political conditions. It was a year marked by two events as one of the great dates of world-history. The States General of France were convoked, after a slumber of a century and a half, to begin for Europe the work of pulling down the ancient forms of centralized authority. The first Congress of the United States at the same time was assembled at New York—a Congress which also exercised the functions of a constitutional convention—to begin for the United States the work of building up a new form of centralized authority, that of a strong central government with a narrow field, side by side with many strong local governments, each with a wide field. For Americans, 1789 is the year when a uniform continental system of political administration was first set up with powers adequate for the due protection of rights of person and property.<sup>1</sup>

During the colonial era all large business enterprises had been checked by our dependence on a country whose commercial interests were thought to be antagonistic to our own. The first years of our political independence had been spent in making independence secure. Then came as many more, darkened and confused by differences and rivalries between the states. Not until the new government under our present Constitution came into active operation in the spring of 1789 was a fair field open for the permanent

<sup>1</sup> See John Marshall's observations on this point in his *Life of Washington*, V. 87.

investment of capital in large operations with such an assurance of safety as could command general public confidence.

There is but one mode in which such operations can be conducted with lasting success. It is through some form of corporate organization. There must be a franchise from the state. A business corporation consists of one or more persons authorized by law to use the name and to trade at the risk of another person. This other person is an artificial one, into whose hands is placed the precise amount of money which those who compose it are inclined to put at hazard. If it uses its talent well and makes a profit, they share it among themselves. If it proves an unprofitable servant and cannot pay its debts, they lose, under the principles of the common law, only their original investment, and its creditors lose the rest. Nor is this unjust, for the creditor knew from the first that this artificial person could bind no one but itself.

The joint-stock association, not unfamiliar in our colonial history, such as the Massachusetts land-banks, traded under a company name, but it was not the name of another person. It was not the name of any person, natural or artificial.

The statistics upon which this article is based are mainly derived from one of the recent series of "Yale Bicentennial Publications,"<sup>1</sup> and they show that it was but a small part that the business corporation played in our industrial life before the adoption of the Constitution of the United States.

During the days of colonial government there were in all but six of these of strictly American origin or character. They came in this order: (1) The New York Company "for Settling a Fishery in these parts," 1675; (2) The Free Society of Traders, in Pennsylvania, 1682; (3) The New London Society United for Trade and Commerce, in Connecticut, 1732; (4) The Union Wharf Company in New Haven, 1760; (5) The Philadelphia Contributionship for the insuring of Houses from Loss by Fire, 1768; (6) The Proprietors of Boston Pier, or the Long Wharf in the Town of Boston in New England, 1772.

A corporate character has sometimes been attributed to certain associations of the kind to which reference has been made, formed under a company name for business purposes in the seventeenth century. There seems, however, to be no sufficient evidence that any of these were more than great commercial partnerships. There can be no incorporation without authority from the sovereign power or from some one entrusted by the sovereign power with the right to grant such authority in its behalf. There can be no business

<sup>1</sup> *Two Centuries of Growth of American Law*, 296-311.

corporation, in the ordinary and proper sense of that term, without a voluntary acceptance of corporate privileges so granted for business purposes.<sup>1</sup>

In the foregoing list of colonial charters none has been included that was granted directly by the home government. That of the Massachusetts Bay Company, out of which soon grew the colony and province of Massachusetts, was an example of one type of these; the monopolistic charters of the Hudson's Bay Company and the Ohio Company, of another.

At the opening of the eighteenth century there were in England but three joint-stock companies under full charters for purposes of foreign commerce.<sup>2</sup> America claimed one — the Hudson's Bay Company. This had a crown charter from Charles II., confirmed for seven years by act of Parliament in 1690.<sup>3</sup> The Ohio Company, composed partly of Englishmen and partly of Virginians, was chartered in 1749 to promote a land speculation, and the Virginia assembly was compelled by the home government to make it a grant of 600,000 acres.<sup>4</sup> The Susquehanna Company, formed about the same time (1743), which made the settlement at Wyoming out of which grew the short-lived county of Westmoreland in Connecticut, had no charter,<sup>5</sup> although they sought one from the Crown, and with the full consent and approval of the Connecticut legislature.<sup>6</sup> Like almost all the land companies of the eighteenth century, it was a mere partnership.<sup>7</sup> Some of these had nearly a thousand members; others, only two or three.<sup>8</sup>

There were numerous instances of the incorporation or quasi-incorporation of proprietors of lands by the colonies, for the purpose of improving their property by concerted effort. The earliest of these occurred in Massachusetts in 1652, when thirteen owners of land upon Conduit Street in Boston were incorporated (though with no company name) to enable them to supply houses on that street with water. Each had an equal share in the undertaking, which was successfully prosecuted.<sup>9</sup> Many quasi-corporations of

<sup>1</sup> *Op. cit.*, 268-272.

<sup>2</sup> Anderson, *Hist. of Commerce*, II. 598. Another American charter had been granted in 1692 for "The Company of Merchants of London Trading to Greenland," but little was ever done under it.

<sup>3</sup> Winsor, *Narr. and Critical Hist. of America*, VIII. 5, 9.

<sup>4</sup> Winsor, *op. cit.*, V. 570; Hildreth, *Hist. of the U. S.*, II. 433.

<sup>5</sup> *The Susquehanna Title Stated and Examined*, 33-35.

<sup>6</sup> *Col. Rec. of Conn.*, X. 378.

<sup>7</sup> See Abraham Bishop, *Georgia Speculation Unveiled*, 43.

<sup>8</sup> *Documents accompanying the Report of the Commissioners on the Georgia Mississippi Territory*, 1803, 29, 43.

<sup>9</sup> Davis, "Corporations in the Days of the Colony," *Publications of the Colonial Society of Mass.*, Vol. I.

more importance were subsequently formed in other colonies to promote the drainage of low lands.

Several "marine" societies were also incorporated in the interest of navigation, the main object of which was to bring seamen together in a friendly way for mutual aid and assistance in case of need. These I have regarded as social rather than business corporations. The province of Massachusetts incorporated three such.<sup>1</sup> The first of these acts directed the governor to issue a charter under the seal of the province. He had doubts as to his power to do this, and the question was ultimately referred to the official solicitor or counsel of the Lords Commissioners for Trade and Plantations, Richard Jackson. His opinion, given in 1774, was that as both the colonial and the provincial charters conferred full powers of legislation, this included a power to incorporate.<sup>2</sup> Mr. Jackson was a dissenter, owned lands in New England, had been the colonial agent of Connecticut, and had recently received the degree of Doctor of Laws from Yale College, a corporation chartered by that colony.<sup>3</sup> The point in dispute could hardly have been submitted to one whom circumstances would more naturally dispose to a favorable judgment. A very different opinion had been announced by the crown lawyers in the preceding century, when the incorporation of Harvard College was set up as one of the grounds for vacating the Massachusetts charter.

Of the six colonial incorporations in the list which has been given, two belong to the seventeenth and four to the eighteenth century. The first, dating back to 1675, a New York fishing company, was chartered by the governor and council of New York, acting for the Duke of York under the liberal terms<sup>4</sup> of his patent of 1664. The capital stock was divided into shares of the par value of ten pounds.<sup>5</sup> This was under the administration of Governor Andros. Governor Dongan, in 1684, was authorized to promote the formation of another to engage in the eastern fisheries at Pemaquid, and, as he subscribed £100 in the name of the Duke to the capital stock of such a company, there being other subscriptions to the amount of £2,400 more, it is probable that a charter of incorporation was granted, but it does not appear that any organization was ever effected.<sup>6</sup>

<sup>1</sup> In Boston, Salem, and Marblehead.

<sup>2</sup> *Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay*, III. 708; V. 191, 288.

<sup>3</sup> *Literary Diary of Ezra Stiles*, I. 315, 412; III. 266.

<sup>4</sup> *Docs. Relating to the Colonial Hist. of N. Y.*, II. 296.

<sup>5</sup> *Ibid.*, III. 234.

<sup>6</sup> *Ibid.*, 349, 355.

The Free Society of Traders in Pennsylvania was chartered by Governor Penn soon after he had obtained his patent, and it received extraordinary privileges. It was in furtherance of a scheme for a land as well as a trading speculation, and the corporation was invested with the lordship of the manor of Frank, and the right to have three representatives in the provincial council or assembly.<sup>1</sup>

The subscription agreement was drawn up in March, 1682, in London, where the patent, or grant of incorporation, had been issued,<sup>2</sup> and the first officers were elected there;<sup>3</sup> but it was to be distinctively an American company,<sup>4</sup> with its seat at the capital of Pennsylvania, where all its meetings after the first were forever to be held. A capital stock of £5,400 was subscribed under date of April 26, 1682.<sup>5</sup> At all meetings, subscribers for £50 were to have one vote, those for £100, two votes, and those for £300 or over, three votes; provided that no one could cast over one vote unless he resided in Pennsylvania or owned 1,000 acres of inhabited land there. The articles of association under the patent provided that the first general assembly held in Pennsylvania should be asked to ratify it. Of that assembly, which met in December, 1682, Dr. Nicholas More, the first president of the society, was chosen speaker,<sup>6</sup> but it does not appear from its records that any application was made either then or later for any such legislation.<sup>7</sup> The society had evidently settled on a different course. Governor Penn had made large sales of lands in his new province early in 1682. After the society had been incorporated and shortly after the grant of the charter of April 25, 1682, the leading purchasers of these lands had met in London (May 5, 1682) and with Penn's consent had adopted certain provincial "Laws." One of the articles (Art. XXXI.) expressly ratified the charter of the society. Another provided that none of these laws should ever be altered except by the concurrence of the governor and six-sevenths "of the freemen

<sup>1</sup> *Two Centuries of Growth of American Law*, 305; see also *Colonial and Provincial Laws of Pa.*, 473; *Pa. Stat. at Large*, ed. 1899, III. 345; *Col. Rec. of Pa.*, II. 154; III. 158.

<sup>2</sup> *Minutes of the Provincial Council of Pa.*, I. 40 (Art. 31); Hazard, *Register of Pa.*, I. 396.

<sup>3</sup> May 29, 1682.

<sup>4</sup> It styled itself the Free Society of Traders in Pennsylvania (Winsor, *Narr. and Critical Hist. of America*, III. 498).

<sup>5</sup> *Pa. Magazine of History and Biography*, V. 37; XI. 175.

<sup>6</sup> *Collections of Hist. Soc. of Pa.*, I. 196; Winsor, *Narr. and Critical Hist. of America*, III. 485.

<sup>7</sup> The records of the early assemblies are incomplete. *Votes of Assembly*, I. 60, Appendix xiv.

met in Provincial Council and General Assembly.”<sup>1</sup> After this the Free Society was free of the assembly.

On the last day of the first session of that body a debate arose “touching the Power of the Society of Traders in Philadelphia,” which resulted in the appointment of two members of the assembly to confer with the governor as to Article XXXI,<sup>2</sup> but nothing came of the attack. His eldest son and many of his friends were large stock-holders; the society itself had bought 20,000 acres of land from him;<sup>3</sup> and the money which it proposed to invest in the new settlement made it a valuable auxiliary in the development of his commercial plans. Like most trading companies, its promise was greater than its performance. A letter from James Claypoole, its first treasurer, written from London to his brother, July 14, 1682, speaks with great confidence of its flattering prospects and assures him that he can safely recommend its shares as an investment. “We could very well,” he writes, “employ 20,000 pounds. . . . It may come to be a famous company.”<sup>4</sup> A great trade with the natives was anticipated, and this letter refers to a missive to be dispatched by order of the society by a special messenger, bearing suitable presents, to the “Emperour of Canada.” This document had been already prepared. It was written on parchment, under the seal of the society and the hand of the president at London, June 19, 1682, and begins thus:

*Friend.* I have sent you this Letter and Messenger to let you know that I am elected President of the Free Society of Traders of Pennsylvania and, as I am such, have the Power and Free Consent of all these good men to treat with you, your Kings, and your people in all things pertaining to Trade.<sup>5</sup>

The society secured 400 acres of land within the city liberties of Philadelphia. Part of this ran from river to river, fronting on a street near where Pine Street now is.<sup>6</sup> It set up, in 1683, a tannery and a grist-mill, and in 1684 a saw-mill and a glass factory.<sup>7</sup> No manorial rights were ever exercised,<sup>8</sup> and the provincial charter

<sup>1</sup> Poore's *Charters and Constitutions*, II. 1526; *Votes of Assembly*, I. xxxv. The assembly, however, did reenact at least one of these laws, which were styled in its records the “printed constitutions” in contradistinction from certain proposed laws styled “written constitutions.” *Ibid.*, 5.

<sup>2</sup> *Votes of Assembly*, I. 4.

<sup>3</sup> *Pa. Archives*, I. 44.

<sup>4</sup> Manuscript letter-book of James Claypoole in library of Hist. Society of Pa. It was begun in London and finished in Philadelphia.

<sup>5</sup> Hazard, *Register of Pa.*, I. 394, 397.

<sup>6</sup> Proud, *Hist of Pa.*, I. 191, 246, 264; Lewis, *Essay on Original Land Titles in Phila.*, 109, 118, 170.

<sup>7</sup> Letter-book of Claypoole, May 29, 1684.

<sup>8</sup> Lewis, *op. cit.*, 220, 224.

of April 25, 1682, made no provision for representation of the society in the provincial council. The first session of that body was held on March 10, 1683, and it is significant that at the next, two days later, "Nicholas Moore, President to the Society of Free Traders in this province," was brought before it on a charge of having said in a public house that at the first meeting the council had broken the charter and might be impeached for treason.<sup>1</sup> He denied having said quite this, but evidently had come dangerously near it, and it is not improbable that one of the causes of his remarks was dissatisfaction at the manner in which the charter of the society had been disregarded in that of the province and in the actual composition of the council.

What of its capital stock did not go into land was invested in cargoes of English goods. They were sold at a great profit, but on trust. The purchasers failed to pay, and on May 29, 1684, the treasurer of the society (who was a Quaker and opposed to lawsuits) wrote, "we have neither credit nor money, and now must sue people at law or be forced to loose all." "I am so weary," he adds, "of the Society's business that I will get clear as soon as I can."<sup>2</sup>

In a few years the society went practically out of business, except as an owner of real estate. There were no dividends, and some of the English shareholders applied in August, 1704, to the provincial council for an order that the managing officers render an account. It seems to have been difficult to discover who these were, for the council "ordered that Benjamin Chambers, said to be late President of the said Society,"<sup>3</sup> produce its books. A letter of Penn, written in February, 1705/6, refers to the society in a way which indicates that it had been used by his steward, Philip Ford, who was one of its original promoters, as one of his instruments for bringing the governor into his debt.<sup>4</sup> We hear no more of its doings until 1721, when a bill was passed by the provincial assembly to wind up its affairs and distribute among its shareholders what might remain. The governor, Sir William Keith, refused his assent on the ground that the proceeding was an irregular and *ex parte* one. Subsequently, on March 2, 1722/3, it was reenacted with certain amendments suggested by him, and trustees were appointed, who sold out its property and distributed the proceeds.<sup>5</sup> So passed

<sup>1</sup> *Minutes of the Provincial Council*, I. 58.

<sup>2</sup> Manuscript letter-book of James Claypoole.

<sup>3</sup> *Col. Records of Pa.*, II. 153.

<sup>4</sup> *Memoirs of the Hist. Soc. of Pa.*, X. 108.

<sup>5</sup> *Votes of Assembly*, II. 290, 294, 361; *Colonial Records of Pa.*, III. 138; Shepard, *History of the Proprietary Government of Pa.*, 45; Scharf and Westcott, *Hist. of Phila.*, I. 202.



out of existence, after a struggle of forty years against adverse circumstances, the most important of the colonial incorporations.

Nine years later came the first New England charter, that of the New London Society United for Trade and Commerce. The history of the Pennsylvania company has been sketched at length because that task, it is believed, has not been attempted before. That of the brief but meteoric career of the Connecticut company, which was soon turned by its promoters into a land-bank, may be dismissed with a word, for it has been often told,<sup>1</sup> and fills a large place in the colonial records. It was the first purely trading company chartered in any colony,<sup>2</sup> and the last. Not even a joint-stock association for business purposes of more than six persons, the shares in which were transferable, could be formed here after 1741, when the Bubble Act of 1720 was extended over the American colonies by act of Parliament.<sup>3</sup>

The charter for the Union Wharf in New Haven, granted in 1760,<sup>4</sup> was for the encouragement of what was really a matter of public enterprise. New Haven had a shallow harbor. A long wharf was indispensable for the development of its trade. A few public-spirited citizens had begun the work, but death had lessened their number, and the heirs of those who had passed away took little interest in the project. To give permanence to the undertaking and enable the majority of the owners to enforce proper repairs a charter seemed necessary, and it proved effectual.<sup>5</sup>

The Pennsylvania insurance charter of 1768<sup>6</sup> was the outcome of a scheme primarily designed to secure householders against risk by fire, rather than to open an avenue for profit on invested capital. It gave corporate form to what for sixteen years had been in existence as a voluntary association for mutual protection. The original plan was to issue seven-year policies on deposit of a gross premium. The interest on this belonged to the company: the principal remained the property of the depositor, subject only to the risks of the business. At the end of the seven years' term, the proportion of the losses and expenses of the company which this

<sup>1</sup> Caulkins, *Hist. of New London*, 242; Bronson, *Hist. of Continental Currency*, etc., in *Papers New Haven Colony Hist. Society*, I. Part II., 42; Baldwin, *Modern Political Institutions*, 185; Davis, *Currency and Banking in the Province of Mass. Bay*, Publications of the Am. Economic Association, 3d Series, Vol. II. Part II., 102 (much the fullest account).

<sup>2</sup> *Col. Rec. of Conn.*, VII. 421.

<sup>3</sup> See *Publications of the Col. Soc. of Mass.*, III. 27.

<sup>4</sup> *Col. Rec. of Conn.*, XI. 400

<sup>5</sup> Trowbridge, *History of Long Wharf in New Haven*, in *Papers of the New Haven Col. Hist. Soc.*, I. 83.

<sup>6</sup> *Laws of Pa.*, Smith and Reed's ed., I. 279.

deposit ought equitably to bear was determined, and a new start made on the basis of this account. Each depositor was liable to his fellow-members for losses to the amount of his deposit and half as much more. As policies were issued only to members, this limitation of his personal loss could be effectually made. In fact, it was a kind of private club. The members held monthly meetings, and if any one failed to attend he was fined for his absence, the fines thus received being applied to setting up mile-stones on the roads leading into the city.<sup>1</sup> Like so many of the new things of his day, this company was set on foot by Dr. Franklin, who headed the original list of its board of directors. It is still one of the active business corporations of Philadelphia, and among the most important, having accumulated assets of the value of about five millions, and carrying risks of a proportionate amount. In its first year the total insurance effected was only about \$108,000, and the sums deposited for premiums amounted to \$1,291.<sup>2</sup> It has been treated in this paper as a business corporation because it grew to be one in common course by natural development. For a long period it allowed its surplus assets to accumulate, and it was made a question whether it could do otherwise. This question was finally brought, in 1895, before the courts, and it was decided that dividends could be lawfully declared in favor of the members, if the directors saw fit.<sup>3</sup> Since that time it has been in every sense a business concern.

The last charter in our list, that of The Proprietors of Boston Pier, or the Long Wharf in the Town of Boston in New England, granted in 1772,<sup>4</sup> was justified by a condition of things similar to that at New Haven, and proved equally efficacious in securing the end in view.

Pennsylvania also chartered in 1759 what was in effect a life-insurance company for a limited class, styled the Corporation for the Relief of Poor and Distressed Presbyterian Ministers, and of the Poor and Distressed Widows and Children of Presbyterian Ministers. This is still in existence and has done a useful work. Its main design, however, being charitable, it has not been included in the list of colonial incorporations.

Nor does the New York Chamber of Commerce appear there, for though it may fairly be regarded as a business corporation it is not unquestionably of colonial origin. Those who associated to

<sup>1</sup> Bolles, *Industrial History of the United States*, 823.

<sup>2</sup> Scharf and Westcott, *History of Philadelphia*, III. 2114.

<sup>3</sup> *McKean v. Biddle*, 181 *Pu. State Reports*, 361.

<sup>4</sup> *Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay*, V. 200, 262, 288.

constitute it received on March 13, 1770, a patent running in the name of the Crown, though under the seal not of the realm but of the colony of New York. The grant having this form and being made, as it recites, "for the laudable purpose of promoting the trade and commerce of our said Province," at a time when the trade relations of Americans with the mother-country were greatly strained, and the public had been thinking of boycotting English importations more than of increasing them, was made the subject of a confirming act by the legislature of New York in 1784.<sup>1</sup> There was then no Dartmouth College case<sup>2</sup> to settle the doctrine that a charter from the Crown, whether directly or through a provincial governor, was as good after the Revolution as it was before. The chamber, therefore, rightly claims 1770 as the real date of its incorporation, which makes it the oldest in any English-speaking land. That of Glasgow comes next, in 1783, and then that of Edinburgh in 1785. The London Chamber was founded only twenty years ago.

It was not until near the close of the War of the Revolution that the first business corporation owing its franchise purely to American sovereignty came into existence. The country was driven to it by hard necessity. The summer of 1780 found the army without rations, and the Continental currency sunk to a value of hardly two cents on the dollar.<sup>3</sup> As a temporary expedient, a voluntary association of capitalists was formed at Philadelphia to establish a private bank to aid the credit of the United States, and £300,000 in Pennsylvania currency was subscribed for this purpose.<sup>4</sup> The bank was found useful,<sup>5</sup> and on May 26, 1781, soon after the ratification of the first Constitution of the United States, Congress voted to grant a charter for a "national bank" on a plan proposed by Robert Morris, as soon as a capital of \$400,000 should be subscribed, payable in hard money. The par value of each share was \$400. By the close of the year \$70,000 was so subscribed, and those who had made advances to the government through the voluntary association of the year before were ready to take the rest as soon as repaid by the United States. This payment Congress found it difficult to make, and at last Morris, now the Continental Superintendent of Finance, proposed that he in behalf of the United States should subscribe for the balance not yet taken. This

<sup>1</sup> *Laws of New York*, ed. of 1792, I. 80, chap. XXX.

<sup>2</sup> *Dartmouth College v. Woodward*, 4 Wheaton's *Reports*, 518.

<sup>3</sup> Sumner, *Life of Robert Morris*, 41.

<sup>4</sup> *Ibid.*, 79.

<sup>5</sup> *Journals of Congress*, VI. 66, 126, June 21, 22, Sept. 15, 1780; VII. 8, Jan. 4 1781.

suggestion was adopted. He subscribed in this way for about a quarter of a million of the stock, all of which, within the next two years, was disposed of to private individuals.<sup>1</sup> It was upon this basis that Congress, on December 31, 1781, treated the subscriptions as full, and "The President, Directors and Company of the Bank of North America" were finally incorporated. The capital could be increased at the pleasure of the directors to any amount not exceeding \$10,000,000. The bank's notes were to be receivable for public dues, state and federal, and Congress recommended to each state the enactment of a law that no other bank or bankers should be established or permitted to do business within its limits during the continuance of the war.<sup>2</sup>

It proved a profitable as well as a patriotic enterprise. Almost immediately it began to make dividends of 13 and 14 per cent. a year, and under an ancillary charter obtained from Pennsylvania in 1787 it still exists, with a capital of \$1,000,000, and a surplus of nearly twice that sum.<sup>3</sup> In 1782, such ancillary charters, with the monopoly provision recommended by Congress, were granted by Massachusetts, New York, and Pennsylvania. That from Pennsylvania was repealed in 1785 but reenacted two years later. Meanwhile, in 1786, the bank had obtained incorporation from Delaware.

This action of Pennsylvania in 1785 was dictated by a jealousy of corporations formed for private profit, which was characteristic of both English and American sentiment down to the early part of the nineteenth century and was not dissipated in either country until free incorporation began to be offered on equal terms to all, by general laws to that effect.

The long colonial era, then, brought forth but six American business corporations. The thirteen years of sovereign statehood under the Confederation produced twenty, and the Confederation itself gave birth to one. But during the eleven years that remained of the eighteenth century just two hundred more came into existence, the United States here again incorporating one—the first Bank of the United States, greatest of all, *unum sed leonem*.

The first of the state charters for an independent enterprise of real magnitude was given by Massachusetts. By reincorporating the Bank of North America she had confirmed its monopoly of the banking business within her limits during the Revolutionary War.

<sup>1</sup> *Works of James Wilson*, ed. of 1896, I. 552; Sound Currency Tracts: L. Carroll Root, *The First United States Bank*, 3.

<sup>2</sup> *Journals of Congress*, VII. 87, 197, May 26, Dec. 31, 1781.

<sup>3</sup> Sumner, *Life of Robert Morris*, 102; *Hist. of Am. Currency*, 50. A monograph was issued by the bank at the close of its first century of existence, giving a history of its origin and growth.

As soon as she was freed from this obligation by the treaty of peace, she chartered (in 1784) the Massachusetts Bank of Boston. Its original capital was \$300,000, the par value of each share being \$100. Although without any express authority to that effect, it began at once to issue circulating bills. Eighty years later it became a national banking association, as which it still exists. It is worth noting that during its long life as a state bank it issued and redeemed bills to an aggregate amount of over four and a half millions of dollars, and that one half of one per cent. of the total issue were never presented for redemption.<sup>1</sup>

One mining company was incorporated in the same year in Connecticut, to work the beds of iron ore in Litchfield county. Pennsylvania chartered the Agricultural Society of Philadelphia in 1785. Washington wrote of this charter to James Warren<sup>2</sup>: "The Agricultural Society lately established in Philadelphia promises extensive usefulness, if its objects are prosecuted with spirit. I wish most sincerely that every State in the Union would institute similar ones." A mutual insurance company was also chartered in the same city in 1786. This had been organized two years previously as a voluntary association, and for a singular cause. The house of a member of the "Philadelphia Contributionship" society had taken fire in 1783 from a burning shade-tree. That society thereupon refused to take any new risks on houses surrounded with shade-trees, except at an extraordinary rate of premium. The new company was formed by those favoring a more liberal policy, and took a green tree for its corporate symbol.<sup>3</sup> Of the remaining corporations, one was the New York Chamber of Commerce, already described; another was the Associated Manufacturing Iron Company, chartered by the same state in 1786;<sup>4</sup> three were formed for building bridges, and eleven for the improvement of navigation by deepening river channels or constructing canals.

Of the eleven navigation improvement companies two were really one. The Potowmac Company received similar charters from both Virginia and Maryland in 1784, and was the first of the interstate commercial corporations since so common. It grew out of a voluntary organization for the same general purposes, known as the Potomac Company, or the Potomac Canal Company, which had

<sup>1</sup> Sound Currency Tracts: Carroll Root, *New England Currency*, 3.

<sup>2</sup> Oct. 7, 1785. *Writings of Washington*, Sparks's ed., IX. 139, 141.

<sup>3</sup> Bolles, *Industrial History of the United States*, 824.

<sup>4</sup> *Harvard Law Review*, II. 165. Paper by Samuel Williston on "The Law of Business Corporations before 1800."

been in existence since 1762,<sup>1</sup> but had accomplished comparatively little. Washington had been one of the chief promoters until called to the command of the Continental army. Soon after the close of the Revolution he made known his opinion that Maryland and Virginia must unite in creating a corporation for this purpose, unless they made it a public undertaking. He urged upon the attention of the governor of each of these states the necessity for such charters, and put in a strong light the improvements in the navigation of the Potomac that were possible and the great benefits that would result to the whole country from them. "The Western States," he wrote to Governor Harrison of Virginia on October 10, 1784, "stand as it were upon a pivot. The touch of a feather would turn them any way." If the trade of the interior was to flow through the Great Lakes to the St. Lawrence, it would be to benefit Canada: if it followed the Mississippi, it would be to benefit Spain. Improve their connections with the Atlantic states, and the country would be bound together by fresh ties.<sup>2</sup> The term "Western States" was used in this letter, no doubt, to describe the new "distinct states," ten in number, into which Congress in the preceding April had resolved to divide the western territory of the United States.<sup>3</sup> The word "territory" had not then been adopted as a designation of a political community.

Washington's business judgment was always sound, and he was quick to see a business opening. During this same year he was engaged in negotiations for the purchase, in company with Governor George Clinton, of what he termed "the mineral spring at Saratoga," but one of any importance (what is now the High Rock spring) being then known to exist.<sup>4</sup> He was also looking carefully into the merits of James Rumsey's plan and model for a boat which could ascend a river by the aid of the water itself, and he called it to Governor Harrison's attention in the letter from which a quotation has been made, as bearing upon the prospects of the proposed canal. "I consider," he wrote, "Rumsey's discovery for working boats against the stream, by mechanical powers principally, as not only a very fortunate invention for these States in general, but as one of those circumstances which have combined to render the present time favorable above all others for fixing, if we are disposed to avail ourselves of them, a large portion of the trade of the Western country in the bosom of this

<sup>1</sup> Pickell, *Hist. of the Potomac Co.*, 44, 64.

<sup>2</sup> Marshall, *Life of Washington*, V. 12-18; *Writings of Washington*, Sparks's ed., IX. 31, 58, 65, 112, 115.

<sup>3</sup> *Journals of Congress*, IX. 153, April 23, 1784.

<sup>4</sup> *Writings of Washington*, Sparks's ed., IX. 68, 70.

State irrevocably.”<sup>1</sup> Harrison laid this letter before the Virginia assembly, and it resulted in a request from that body, after the enactment of the Virginia charter, that Washington and General Gates, as its representatives, would go to Annapolis and endeavor to secure one similar in form from Maryland. They at once proceeded on their embassy, and with entire success.<sup>2</sup>

The creation of the Potowmac Company by the concurrent action of different states marked a distinct advance in the progress of political science. Never before in the history of the world had two distinct sovereignties united in such a step. Here were the same individuals sustaining similar political relations to different governments, constituted in each an artificial person, dealing under one name with property in each, and amenable in each to the supervision of its authorities. The way in this direction had been opened by the incorporation of the Bank of North America two years before by Pennsylvania and New York, but that was a recognition or affirmation of its Continental franchise rather than an attempt to constitute *ab ovo* a consolidated corporation.

The charter of the Potowmac Company was followed, in 1785, by that of “The Corporation for the Relief of the Widows and Children of Clergymen in the Communion of the Church of England in America,” granted in substantially identical terms by New York, New Jersey, and Pennsylvania.<sup>3</sup> This experiment, in the outcome, proved less satisfactory. While of the nature of a life-insurance company, it served also and primarily a charitable purpose, and there were too many occasions in the administration of its affairs for the clashing of local interests. In 1797 it was divided up into three corporations, one chartered by each of the three states concerned.

As to another of the Virginia corporations of this period, however, the plan of interstate incorporation was again tried, and with better results. This was the Dismal Swamp Canal Company,<sup>4</sup> which Virginia incorporated in 1787 and North Carolina in 1790.

It will be observed that the latter date belongs to the period following the adoption of our present national Constitution. The provision in that instrument (Art. I., § 10) that no state shall without the consent of Congress enter into any agreement or compact with another state was thought by many to forbid the formation of any

<sup>1</sup> *Ibid.*, 58, 68, 104.

<sup>2</sup> *Writings of Washington*, Sparks's ed., IX. 82, 91.

<sup>3</sup> The same organization had held a patent of incorporation from the proprietaries of Pennsylvania since Feb. 7, 1769. Bolles, *Industrial History of the United States*, 837.

<sup>4</sup> I am informed by Dr. Kemp P. Battle that Washington was a stock-holder and that it constructed a canal which proved profitable.

corporation by the concurrent legislation of different states. To this may be attributed the rarity of such charters until within the last quarter of a century, when it was settled by judicial decisions that the constitutional prohibition referred only to agreements or compacts of such a nature as to change the political relations of one state to another or to the United States.<sup>1</sup>

It is easy to see why the American colonies created so few business corporations. It is, at least, doubtful whether the colonial assemblies had a right to create any. The patentees under the earliest grants, so far as they had the power, had little inducement to use it. No trading charter in those days was thought worth having unless it carried a monopoly,<sup>2</sup> and patentees who had secured a general monopoly for themselves within a certain territory were naturally indisposed to share it with others.

The causes for the paucity of state charters between 1776 and 1789 are not to be so readily assigned. It was not for want of money to invest. There were before the Revolution and throughout the Revolution large fortunes held by Americans. Others were accumulated because of the Revolution, and some of them from government contracts for supplies and munitions of war, in the execution of which considerable capital was required, and which involved heavy personal risks, against which a corporate franchise would have been a convenient shield. Nor are corporations especially the agents of the rich. It is the man with five hundred or a thousand dollars to invest to whom they are the greatest boon. Before the Revolution such a person had been apt to put his money into a share in a ship or a share in a land company. During the Revolution and for many years after its close, he did the same. In the roll of twenty shareholders in the Georgia Company of 1795, which made the famous Yazoo purchase, but one man, James Wilson, appears as a subscriber of over £2,000, and two put in £200 or less.<sup>3</sup> Both the small and the large capitalist would have been glad to make his investment under the protection of a charter, but neither wished a charter that did not protect.

The commercial policy of each of the new states was at the outset a narrow and selfish one. This was a natural outgrowth of colonial conditions. The tendency of legislation as to matters of intercolonial interest had been, and as to those of interstate interest was, towards what was unfriendly. The prevalent note was

<sup>1</sup> *Baltimore and Ohio R. R. Co. v. Harris*, 12 Wallace's *Reports*, 65, 82; *Virginia v. Tennessee*, 148 *United States Reports*, 503, 519.

<sup>2</sup> See Adam Smith, *Wealth of Nations*, III., Book v., chap. I., 145, 146.

<sup>3</sup> *Documents accompanying the Report of the Commissioners on the Georgia Mississippi Territory*, 1803, 37.



retaliation rather than reciprocity. All this gave little assurance that a franchise from one state would be respected in another. The Articles of Confederation, when they were framed, provided (Art. IV., § 1) that the people of each state should have free egress to and from any other state and enjoy therein all the privileges of trade and commerce, subject to no other restrictions than those imposed upon its own inhabitants. This gave no rights to corporations. Indeed, it was probably worded with a view, in part, of preventing any which might be created with exclusive trading privileges from claiming them to the prejudice of citizens of other states. It was this state of things, no doubt, which influenced Madison's twice-repeated proposition in the Constitutional Convention of 1787 to confer on Congress the power "to grant charters of corporations in cases where the public good may require them, and the authority of a single state may be incompetent." Pinckney desired to go further and give a general power to this effect without limitations. The discussion which followed in the Convention went to the bed-rock of the whole matter. Madison stated that his primary object was to secure the easy communication between the states which the free intercourse now to be opened seemed to call for. Political obstacles had been removed; natural ones should be. Wilson urged the importance of canals to connect the east and the west. Rufus King declared that the states would be prejudiced and divided by the grant of any such power. It might be used to set up banks or create monopolies. At Mason's instance, the proposition was confined to granting power to charter canal companies, and it was then defeated by eight states to three.<sup>1</sup>

In ratifying the Constitution, four states (Massachusetts, New Hampshire, North Carolina, and Rhode Island) recommended that it be amended by a provision that Congress should erect no company (or no company of merchants) "with exclusive advantages of commerce," and New York asked for a further prohibition of all grants of monopolies.<sup>2</sup> Attempts to carry such measures were made in the first Congress, and renewed in 1793, but without success.<sup>3</sup> It was in the apprehension that these proposals indicated where, in truth, lay the great barrier of all to the multiplication of business corporations under the political conditions then existing. The people, as has been already said, were afraid of them. As they reviewed their history in England, they saw that a monopoly

<sup>1</sup> Madison's *Journal*, Scott's ed., 549, 550, 725, 726. Cf. Hamilton's opinion on the constitutionality of a United States bank, *Works*, IV. 116, 134.

<sup>2</sup> *Journals of Congress*, 13, 167, 172, 182, 189; Elliot's *Debates*, I. 336.

<sup>3</sup> *Report of Am. Hist. Ass'n for 1896*, Pt. II., 253.

had walked in the shadow of each. They were in their very nature embodiments of special privileges.

In 1784 the leaders of each of the great parties, which were already forming, were before the New York legislature with petitions for bank charters. Chancellor Livingston sought one for a land-bank; Hamilton another for one of discount and deposit.<sup>1</sup> We may be sure that political influence was not wanting to back these petitions. Log-rolling was not then unknown. Both, however, were rejected, and although Hamilton and his associates had gone so far that they proceeded to set up business as a voluntary association by the name of the Bank of New York, no charter could be got for it until 1791.

The public jealousy of corporations against which Hamilton and Livingston could avail nothing in New York was felt, though not everywhere with equal force, throughout the Union. There was but one thing that could effectually remove it. That was to remove the cause. To deprive the corporate franchise of the character of a special privilege and make its possession free to all—this was to be the next great step in the evolution of American combinations of capital for business purposes. North Carolina had been one of the sturdiest upholders of the rights of the people. She had unwillingly acceded to the establishment of a national government. She had failed to convince Congress that it ought to ask the people to forbid it to grant monopolies. In 1795 she struck out into a new field for herself and gave the modern world an object-lesson in political science. For the first time since the beginnings of the Roman Empire,<sup>2</sup> a sovereign state offered incorporation for business purposes to any who desired it, freely and on equal terms. As became a government venturing on so novel an experiment, she confined her offer to a single class of business enterprises—the construction of canals; but she gave a generous franchise, including the right of eminent domain, providing only that the works should become public property whenever the shareholders should have received their capital with interest at six per cent.<sup>3</sup> The example thus set was soon imitated by other states, and the vast number of business corporations formed under general laws that the nineteenth century brought forth to change the face of the United States witnesses the wisdom of making freedom of incorporation one of our fundamental political institutions.

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<sup>1</sup> *Works of Hamilton*, I. 414.

<sup>2</sup> Up to 1795 general incorporation laws had been restricted to the formation of charitable, religious, or literary corporations. Baldwin, *Modern Political Institutions*, 148, 174, 193, 194.

<sup>3</sup> *Laws of North Carolina*, ed. 1821, I. 769.